IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25-07-2006

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

W.P. No. 7200 of 2006
and
W.P.M.P. No. 7890 of 2006
-o-

Madras Race Club
rep. by Mr. Aruna
Officer In-charge (Legal)
Guindy, Chennai - 32 .. Petitioner

Versus

1. The Chennai Metropolitan
   Development Authority
   rep. by its Member Secretary
   No.8, Gandhi Irwin Road
   Egmore, Chennai - 600 008

2. The Corporation of Chennai
   rep. by its Commissioner
   Ripon Building
   Park Town
   Chennai - 600 003

3. P.S. Karunakaran
4. P.S. Kumar .. Respondents

Petition under Article 226 of The Constitution of India praying for a Writ of Mandamus as stated therein.

For Petitioner : Mr. A.L. Somayaji, Senior Counsel
for Mr. L. Dhamodharan

For Respondents : Mr. P.R. Raman
Additional Advocate General
for Mr. J. Ravindran for R1

Mr. R. Kannan for R2

Mr. T.R. Rajagopalan, Senior Counsel
for Mr. A.R. Karunakaran
for RR3 & 4

ORDER

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The petitioner has filed this writ petition praying for a Writ of Mandamus directing the respondents 1 and 2 to demolish and remove

the unauthorised construction in Survey No.82, T.S. No.1, Block No.13 put up by the respondents 3 and 4 in Government lands leased out to the petitioner forthwith.

2. Mr. A.L. Somayaji, learned Senior counsel appearing for the petitioner submits as follows:-

The Petitioner is Madras Race Club. The Government of Tamil Nadu under lease deed dated 06.03.1946 leased out the lands to an extent of 83.17 acres comprised in Survey No.82, TS No.1, Block No.13, Velacherry Village, Chennai to the petitioner, however, it is in continuous occupation of the said lands ever since 1845 onwards; that the property comprised in Old Survey No.78 (part) in T.S. No.1, Block No.15, Velacherry Village to an extent of 9600 square feet located on the Northern side of the petitioner's property was purchased by the respondents 3 and 4 herein on 15.12.2003 and construction activities were commenced in September 2005, while doing so, they attempted to encroach into the property of the petitioner, hence, the petitioner sent representations including the one dated 30.09.2005 requesting the respondents 1 and 2 herein to take appropriate action against the respondents 3 and 4, but they failed to take any action, with the result, the petitioner has filed WP No. 32583 of 2005 before this Court praying for a Writ of Mandamus directing the respondents 1 and 2 herein not to sanction the plan submitted by the respondents 3 and 4 in the leased lands of the petitioner in T.S.No.1 (part), Block No.13, Velacherry Village and the said writ petition was ordered by this Court on 07.10.2005 directing the respondents 1 and 2 herein to consider the representation dated 30.09.2005 of the petitioner and pass orders within a period of eight weeks, till such time, not to grant the plan sanction in favour of the respondents 3 and 4. Thereafter, the first respondent, in their letter dated 19.10.2005 informed that no planning permission application was received by them from the respondents 3 and 4 in respect of the land in TS No.1 (part), Block No.13, Velacherry Village. Mr. Somayaji further submitted that the respondents 3 and 4 allegedly obtained planning permission from the second respondent in respect of the lands belonged to them comprised in Survey No.78 (part), T.S.No.1, Block No.15 for ground plus first floor, in total violation of the plan, construction is made in Survey NO.78 (part) T.S. No.1, block No.15, but they illegally extended the construction without plan in S.No.82, T.S. No.1 in Block No.13 by encroaching 5 grounds 357 sq.ft.,; that the present writ petition was filed on 12.03.2006 seeking for a Writ of Mandamus "directing the respondents 1 and 2 to demolish and remove the unauthorised construction in Survey No.82, T.S. No.1, Block No.13 put up by the respondents 3 and 4 in Government lands leased out to the petitioner", however the respondents 3 and 4 continued their unauthorised construction in the lands of the petitioner also; that the first respondent issued a notice of stop work on 23.06.2006 and demolition notice dated 28.06.2006 under Section 56 read with Section 85 of the Tamil Nadu Town and Country Planning Act, hereinafter referred to Act, which is evident that the respondents 3 and 4 have constructed the building in total contravention of the building permission approved for ground plus first floor for their lands and also extended it in the petitioner's land, that too without any plan;

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that the first respondent also said to have sent necessary instructions to the second respondent corporation for demolition of the unauthorised construction. The averments that respondents 3 and 4 on 19.07.2006 submitted an application seeking planning permission to the first respondent invoking Section 49 of the Act is untenable in law, which is nothing but a time gaining tactics. If at all, the said provisions can be made applicable to a person intending to carry out development in future on any land, not for ratifying unauthorised construction already made. In support of this contention, the learned Senior counsel for the petitioner relied on the below mentioned decisions:-

i) (Mahendra Baburao Mahadik and others vs. Subhash Krishna Kanitkar and others) (2005) 4 SCC 99 wherein in Para Nos. 38, 43, 44, 45, 46, 47 and 48, it was held thus:-

> 38. The Municipal Council being a creature of statute was bound to carry out its functions within the four corners thereof. Being a statutory authority, it was required to follow the rules scrupulously. Concededly, the Municipal Council is not possessed of any statutory power to regularise unauthorised constructions. Its power is confined to compounding the offences in certain cases. Moreover, even development charges could not be recovered from the appellant in respect of unauthorised constructions in terms of Section 124-E(2) of the MRTP Act.
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> 43. The jurisdiction of a local authority is confined only to deal with application for grant of permission for construction as contained in Section 44 of the MRTP Act whether at the initial stage or when a notice is served under sub-section (2) of Section 53 of the MRTP Act. The power to grant such permission could be exercised only within the purview of the Building Bye-laws. Therefore, being beyond the scope of Section 44 of the MRTP Act, the Municipal Council did not have any jurisdiction to direct regularisation of such unauthorised constructions by reason of the said resolution or otherwise. The power of the Municipal Council, it is trite, being confined to the provisions of the said Acts, no action could be taken by them contrary thereto or inconsistent therewith.
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> 44. In Friends Colony Development Committee v. State of Orissa this Court opined: (SCC p.744, para 25)
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> '25. Though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of

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time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum....'

45. In M.I. Builders (P) Ltd. v. Radhey Shyam Sahu this Court observed: (SCC p.529, para 73)

'73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.'

A discretionary power must be exercised having regard to the larger public interest.

46. In Consumer Action Group v. State of T.N. this Court held: (SCC p. 443,para 30)

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'While exercising such a power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such a grant on both viz. the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health etc. the exercise of power could not be for the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before exercising such a power. Even otherwise, every individual right including fundamental right is within reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual that may be considered for granting.'

Mr Naphde, therefore, is not correct in contending that the High Court should have taken a lenient view.

47. In Mulchand Agarwalla whereupon strong reliance has been placed by Mr Naphde, this Court upon taking into consideration the provisions of the Calcutta Municipal Act and in view of the terminologies contained in Section 449 thereof noticed that the Magistrate had a discretionary jurisdiction to pass an order of demolition and held: (SCR p.1005)

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"The conduct of the respondent in adopting a hide-and-seek attitude in completing the constructions in deliberate defiance of the law

calls for severe action. It would be most unfortunate, and the interests of the public will greatly suffer, if the notion were to be encouraged that a person might with impunity break the building rules and put up a construction and get away with it on payment of fine. All this would be good justification for making an order for demolition."

48. However, keeping in view the provisions of sub-section (2) of Section 363 of the Act which directs that no application for demolition shall be instituted after a lapse of five years from the date of the work, although were found to be inapplicable, but in the fact situation obtaining therein, it was opined: (SCR pp. 1005-06)

"But then, it is now nearly five years since the building was completed, and though Section 363 (2) which directs that no application for demolition shall be instituted after a lapse of five years from the date of the work does not, in terms, apply as the proceedings have been started in time, we do not feel that after the lapse of all this time, an order for demolition is called for in the interests of the public. We also take into account the fact that the orders in question would not have come before us in the normal course by way of appeal, were it not that the appellant desired that the decision of this Court should be obtained on certain questions of importance, and that purpose has been achieved. On a consideration of all the circumstances, we do not think that this is a fit case in which we should pass an order for demolition."

The said decision, therefore, does not support the contention of the appellants.

ii) (Seema Arshad Zaheer and others vs. Municipal Corporation of Greater Mumbai and others) JT 2006 (11) SC 1 wherein in Para-30, it was held thus:-

"30. It is true that in cases relating to orders for demolition of buildings, irreparable loss may occur if the structure is demolished even before trial, and an opportunity to establish by evidence that the structure was anthorised and not illegal. In such cases, where prima facie case is made out, the balance of convenience automatically tilts in favour of plaintiff and a temporary injunction will be issued to preserve status quo. But where the plaintiffs do not make out a prima facie case for grant of an injunction and the

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documents produced clearly show that the structures are unauthorised,t he court may not grant a temporary injunction merely on the ground of sympathy or hardship. To grant temporary injunction, where the structure is clearly unauthorised and the final order passed by the Commissioner (of the Corporation) after considering the entire material directing demolition is not shown to suffer from any infirmity, would be to encourage and perpetuate an illegality...."

3. Citing the above decisions, the learned Senior counsel for the petitioner prayed this Court for necessary directions to the respondents 1 and 2 to demolish the unauthorised super-structure found in Block No.13.

4. Mr. P.R. Raman, learned Additional Advocate General appearing for the first respondent submitted that as soon as the alleged unauthorised construction was brought to the notice of the first respondent, stop work notice was issued to the respondents 3 and 4 on 26.06.2006 and thereafter notice for demolition under Section 56 read with Section 85 of the Act was issued and the same was also communicated to the second respondent corporation for necessary follow up action. The first respondent, following the site plan maintained by them sent a reply dated 19.12.2005 to the petitioner stating that they have not received any application for planning permission sanction in respect of their lands in Block No.13 from the respondents 3 and 4. The plan was issued to respondents 3 and 4 by the second respondent in the year 2004 for development/construction in block No.15 only. On inspection, the first respondent came to know the violations of the plan approved and also additional areas added with the approved area and construction made thereon. In clear terms, the learned Additional Advocate General submitted that construction was also made in the petitioner's land in block No.13. It is further submitted by the learned Additional Advocate General that under Section 49 of the Act, the respondents 3 and 4 may seek for revised plan if at all only for Block No.15 and not entitled for Block No.13 which was constructed without permission.

5. Mr. Kannan, learned counsel appearing for the second respondent corporation submitted that the plan was issued to the respondents 3 and 4 in the year 2004 for ground plus first floor, but they have constructed ground, first, second and third floor part; that the violations pointed out in the demolition notice dated 28.06.2006 of the first respondent was endorsed by the second respondent. Mr. Kannan also adopted the arguments of the learned Additional Advocate General appearing for the first respondent.

6. Mr. Rajagopalan, learned Senior counsel appearing for the respondents 3 and 4 submitted as follows:-

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The petitioner has already filed a suit in O.S. No. 353 of 2006

before the III Assistant Judge, City Civil Court, Chennai for the very same relief of demolition, restoration of possession and other reliefs as well, suppressing the same, the present writ petition has been filed. The affidavit filed in support of the writ petition does not disclose infringements of legal right of the petitioner or neglect of statutory and public duty of respondents 1 and, as such, the writ petition is not maintainable at all; that the respondents 3 and 4 purchased the property in Block No.15 under a sale deed dated 15.12.2003; that adjoining portion of land belonged to the Government of Tamil Nadu in Block No.13 was also allotted to their predecessor in title Mrs. Vijayalakshmi and others, who is paying FCR for the same to the authorities.; that the respondents 3 and 4 have obtained sanction plan from the second respondent in No.2894 of 2004 dated 02.07.2004 and constructed the building on the said land in block No.15, which was also leased out to M/s. MPL Cars and Vehicles Private Limited; that the respondents 3 and 4 have put up a temporary shed in Block No.13, which has a compound wall for more than 25 years old and a toilet, both were constructed by the said Vijayalakshmi; that the petitioner is not aggrieved in any manner with the construction raised by the respondents 3 and 4 in their land; that at no point of time, the petitioner raised any objection when the respondents 3 and 4 demolished the old house and raised the existing construction; that when the suit is filed in O.S. No. 353 of 2006 before the civil court for the same relief, suppressing the same, the petitioner has filed the present writ petition which disclose that the petitioner has not approached this Court with clean hands; that the revenue department was not impleaded as a party in this writ petition; that the respondents 3 and 4 have also filed necessary application on 19.07.2006 before the first respondent invoking Section 49 of the Act and once the said application is received, the demolition notice shall not have any effect pending final determination of the same and the respondents 3 and 4 are certainly entitled to the benefits of Section 49 of the Act; that when the application is filed under Section 49 of the Act, the third party like the petitioner cannot have any say; that there is an appeal remedy provided under the Act before the State Government in case if an adverse order is passed by first respondent and prayed for dismissal of the writ petition.

7. This Court carefully considered the arguments of the counsel on either side and perused the records. The land claimed to have belonged to the petitioner hereinafter referred to as land in Block No.13 and the land of the respondents 3 and 4 as land in Block No.15 so that the repetition of corresponding Survey Number and Town Survey Number be avoided.

8. The averments of the petitioner is that the respondents 3 and 4 under the pretext of constructing building in Block No.15 encroached into the lands of the petitioner in block No.13. The petitioner has filed WP No. 32583 of 2005 wherein the respondents 3 and 4 herein were arrayed as respondents 1 and 2. The said writ petition was disposed of by this Court on 07.10.2005 as mentioned below:-

"In view of the submissions made by the

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counsel on either side, the writ petition is disposed of with an observation to consider the objections raised by the petitioner in respect of the construction on his representation dated 30.09.2005 in accordance with law, within a period of eight weeks from the date of receipt of a copy of this order, till such time, the statutory respondents shall not grant plan sanction."

9. Thereafter, the first respondent in their letter No.C3/25652/05 dated 19.12.2005 informed the petitioner that no planning permission application has been received by them from the respondents 3 and 4 for the alleged construction in the land bearing T.S. No.1 part, Block No.13 of Velacherry Village. It is stated by the petitioner that even without planning permission, the respondents 3 and 4 have encroached into their lands in block No.13 and made unauthorised construction, besides, constructed second and third floors in total violation of the building plan issued by the second respondent. In this context, it is necessary to look into the demolition notice dated 28.06.2006 issued by the first respondent, which is extracted below:-

"Form-II (SEC.56)
CHENNAI METROPOLITAN DEVELOPMENT AUTHORITY, EGMORE, CHENNAI-8

DEMOLITION NOTICE

(Notice Under Section-56 read with Section 85 f Town and Country Planning Act, 1971, requiring compliance with the planning permission granted under Section-49 of the Act by Demolishing the portions constructed in contravention of the permission)

Letter No.ES2/13374/06 Dated:28.06.2006
Sub : Construction in contravention of planning permission approved for Ground floor+first floor at Door No.123, Old No.82, Velacherry Main Road, Kannigapuram, Guindy, Chennai 32

Ref : 1) Stop work notice No.D-2839 dt.23.6.2006
2) P.P.A.No.D9/3029/2004 & B.A.No. D9/2984/2004 dt. 2.7.2004

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The construction of Ground + first floor at Door No.123, Old No.82, Velacherry Main Road, Kannigapuram, Guindy, Chennai-32 is in contravention to the planning permission granted under Section 49, Town and Country Planning Act, 1971 and issued to you under reference cited on your application.

The deviation to the approved plan are as

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indicated below:-

| S. No. | Description | As per approved plan | As on site | Deviation |
|---|---|---|---|---|
| 1 | Front set back | | | |
| | at GF | 20' 0" | 16' 4" | Less by 3' 9" |
| | at FF | 20' 0" | 12' 4" due to 4' continuous balcony | Less by 7' 8" |
| 2 | Rear Set back | | | |
| | at Southwest Corner | 15' 0" | 5' 1" | Less by 9'11" |
| | at Northwest Corner | 15' 0" | Nil | Less by 15'0" |
| 3 | Side set back (South) | 5' 0" | 5' 4" | Nil |
| 4 | Side set back (North) | | | |
| | at Northeast Corner | 9' 0" | Nil | Less by 9' 0" |
| | at Northwest Corner | 9' 0" | 9' 11" | Nil |

Note: As per approved plan, the site dimension is 90' 0" X 106' 6" whereas at site the compound wall constructed is much more and does not tally with the approved plan site dimension. As per approved plan, the building dimension is 71'6" X 76'0" whereas constructed is more than approved plot area of 90'0" X 106'6". Hence the set back measurements of SSB (South), SSB (north) and RSB mentioned above are approximate only.

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| | | | | |
|---|---|---|---|---|
| 5 | Length of building at GF level | 71' 6" | 85' 1 ½" | Excess by 13' 7 ½" |
| 6 | Width of building at | | | |
| | Eastern side | | | |
| | Western side | 76' 0" | 89' 3" | Excess by 13'3" |
| | | 76' 0" | 75' 3" | Nil |

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| | | | | |
|---|---|---|---|---|
| 7 | No. of floors | GF + FF | GF+2F+3F pt. (one room & AC sheetshed) | 2nd floor & 3rd floor pt (one room & AC sheet shed) unauthorised |

Others:

Extent of site as on ground does not match with the approved plan. Additional areas added with the approved area and constructions made.

Portico in FSB to a size of 21'3" X 27' 9" not covered in approved plan

Continuous balcony projection 4' 2ide at 1st floor and 2nd floor in FSB and SSB (north) are not covered in approved plan

Temporary shed in SSB (north) to a size of 26' 0" X 12' 0" not covered in approved plan

As per approval the usage is cottage industry and residential with 3 dwelling units whereas being used by MPL Ford for automobile service station.

The following Structures constructed are not within the site boundary (with reference to approved plan):

i) Ground floor AC sheet shed car service area of size 28'0" X 23'3"
ii) Ground floor RCC roof (store room) to a size of 22'9" X 23'3"
iii) Ramp leading to first floor service car parking
iv) Ground floor AC sheet car wash area of size 25'9" X 42'0"
v) Ground floor RCC toilet of size 14'9" X 9'6"
vi) Water storage at ground level
vii) Ground floor AC sheet sheds (painting area) of size 12'0" X 20'0" and 19' 1 ½" X 36'0"

a) Additional floors - 2nd floor & 3rd floor part (one room and AC sheet shed) is unauthorised constructions

b) other requirements -

You are hereby called upon to secure compliance with sanctioned plan, within 30 days from the date of service of this notice, failing which action will be taken under Sec.5-A, sub-sec (5) clause (b) (i) and (ii) Town and Country Planning Act, 1971 to secure compliance of the sanctioned plan, without any further notice to you.

For MEMBER-SECRETARY

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To

Thiru.P.S. Karunakaran & P.S.Kumar
Door No.44 (Old No.30)
Kavarai Street
Saidapet, Chennai-15"

10. It is evident from the above that the front set back deviation at ground floor, first floor, rear set back at south west corner, northwest corner, side set back (south), side set back (north), north east corner, north west corner, compound wall constructed not tallied with approved site dimension, constructed more than the approved plot areas, excess of length of building at ground floor level, excess width of building at eastern and western side, second and third floors unauthorised, the extent of site as on ground does not match with the approved plan, additional areas added with approved area and construction made, portico constructed not covered in approved plan, continuous balcony projection at first floor, second floor temporary shed in SSB (north). In addition to that the following structures constructed within the site boundary:-

i) Ground floor AC sheet shed car service area
ii) Ground floor RCC roof (store room)
iii) Ramp leading to first floor service car parking
iv) Ground floor AC sheet car wash area
v) Ground floor RCC toilet
vi) Water storage at ground level
vii) Ground floor AC sheet sheds
viii)) Additional floors - 2nd floor & 3rd floor part

11. Admittedly, the respondents 3 and 4 herein have not disputed the violations mentioned in the said notice but stated that they have filed application on 19.07.2006 under Section 49 of the Act for permission before the first respondent and once such application is filed, the notice issued under Section 56 read with 85 of the Act for demolition shall not be of any effect pending final determination or withdrawal of the same, hence, the demolition sought for by the petitioner cannot be ordered till the disposal of the said application or withdrawal of the same.

12. The learned Additional Advocate General appearing for the first respondent submitted that the respondents 3 and 4, without any planning permission extended the construction in the lands in block No.13 belonged to the petitioner, hence, the application under Section 49 of the Act if at all be entertained only in respect of the plan already obtained for the lands in Block No.15 but not for the lands in block No.13.

13. Now, we look into the relevant provisions of Tamil Nadu Town and Country Planning Act which runs as follows:-

"47. Use and development of land to be in confirmity with development plan.- After the coming

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into operation of any development plan in any area, no person other than any State Government or the Central Government, or any local authority shall use or cause to be used, any land or carry out any development in that area otherwise than in conformity with such development plan;

Provided that the continuance of the use of any land for the purpose and to the extent for, and to which it is being used on the date on which such development plan comes into operation, may be allowed for such period and upon such terms and conditions as may be specified in such development plan.

48. Restrictions on buildings and lands in the area of the planning authority.- On or after the date of the publication of the resolution under sub-section (2) of Section 19 or of the notice in the Tamil Nadu Government Gazzette under Section 26, no person other than any State Government or the Central Government or any local authority, shall, erect any building or make or extend any excavation or carry out any mining or other operation, in, on, over or under any land or make any material change in the use of land or construct, form or layout any work except with the written permission of the appropriate planning authority and in accordance with the conditions, if any, specified therein.

49. Application for permission.-(1) Except as otherwise provided by rules made in this behalf, any person not being any State Government or the Central Government or any local authority intending to carry out any development on any land or building on or after the date of the publication of the resolution under sub-section (2) of section 19 or of the notice in the Tamil Nadu Government Gazzette under Section 26, shall make an application in writing to the appropriate planning authority for permission in such form and containing such particulars and accompanied by such documents as may be prescribed.

(2) The appropriate planning authority shall, in deciding whether to grant or refuse such permission, have regard to the following matters, namely:-

(a) the purpose for which the permission is required;

(b) the suitability of the place for such purpose;

(c) the future development and maintenance of the planning area.

(3) When the appropriate planning authority

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refuses to grant a permission to any person, it shall record in writing the reasons for such refusal and furnish to that person, on demand, a brief statement of the same.

56. Power to require removal of unauthorised development:- (1) Where any development of land or building has been carried out-

(a) without permission required under this Act; or

(b) in contravention of any permission granted or of any condition subject to which permission has been granted; or

(c) after the permission for development of land or building has been duly revoked; or

(d) in contravention of any permission which has been duly modified

the appropriate planning authority may, within three years of such development, serve on the owner, a notice requiring him within such period, being not less than one month, as may be specified therein after the service of the notice, to take such steps as may be specified in the notice --

(i) in cases specified in clause (a) or (c) above, to restore the land to its condition before the said development took place;

(ii) in cases specified in clause (b) or (d) above, to secure compliance with the permission or with the conditions of the permission, as the case may be.

2) In particular, any such notice may, for the purposes aforesaid, require-

(i) the demolition or alteration of any building or works;

(ii) the carrying out on land, of any building or other operations:

(iii)the discontinuance of any use of land or building:

Provided that, in case the notice requires the discontinuance of any use of land or building, the appropriate planning authority shall serve a notice on the occupier also.

(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed, apply for permission under Section 49 for the retention of the land, or any buildings or works or for the continuance of any use of the land or building to which the notice relates.

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(4) (a) The notice shall not be of any effect pending the final determination or withdrawal of the application.
(b) (i) The foregoing provisions of this Chapter shall so far as may be, apply to an application made under sub-section (3).
(ii) If such permission applied for is granted on that application, the notice shall not take effect, or if such permission applied for is not granted, the notice shall have full effect, or if such permission is granted for the retention only of some buildings or works, or for the continuance of use of only a part of the land or building, the notice shall not take effect regarding such buildings or works or such part of the land or building, but shall have full effect regarding other buildings or works or other parts of the land or building, as the case may be.

(5) If within the period specified in the notice or within such period after the disposal or withdrawal of the application for permission, the notice or so much of it as continues to have effect, is not complied with, the appropriate planning authority may-

(a) prosecute the owner for not complying with the notice; and in case where the notice requires the discontinuance of any use of land or building, any other person, who uses the land or building or causes or permits the land or building to be used in contravention of the notice; and

(b) (i) in the case where the notice requires the demolition or alteration of any building or works or carrying out of any building or other operations itself cause the restoration of the land to its condition before the development took place and secure the compliance with the conditions of the permission or with the permission as modified by taking such steps as the appropriate planning authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other operations: and

(ii) the appropriate planning authority concerned may recover the cost of any expenses incurred by it in this behalf from the owner as arrears of land revenue.

85. Restoration of property to original state where it is dealt with in contravention of Section 47 or 48.- (1) Where any person-

(a) subject to the proviso to Section 47, uses

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or causes to be used land or carry out any development in that area otherwise than in conformity with such development plan:

(b) has erected any building or made or extended any excavation or carried out any mining or other operations or made any material change in the use of land or constructed, formed or laid out any work in contravention of section 48 or of any condition specified in any permission referred to in that section:

(c) the appropriate planning authority may, by order, require such person to restore the land or building to its original condition, or to bring the land or building in conformity with any condition specified in such permission within such period as may be specified in the order.

(2) If such person fails to comply with such order within the period specified in the order -

(a) the appropriate planning authority may itself take such measures as appears it to be necessary to give effect to the order and recover the cost thereof from such person as an arrears of land revenue: and

(b) such person shall, without prejudice to the provisions of clause (a), be punishable-

(i) with fine which shall not be less than twenty-five rupees and not more than five hundred rupees; and

(ii) in the case of continuing failure, with fine which shall not be less than five rupees and not more than one hundred rupees for every day during which such failure continues.

14. Section 56 of the Act confers power on the respondents 1 and 2 to remove unauthorised construction where any development of land or building has been carried out-

(a) without permission required under this Act; or

(b) in contravention of any permission granted or of any condition subject to which permission has been granted or

(c) after the permission for development of land or building has been duly revoked; or

(d) in contravention of any permission which has been duly modified

15. Under Section 56 (3) of the Act, any person aggrieved by demolition notice may, within the period specified in the notice and in the manner prescribed, apply for permission under Section 49 for the retention of the land, or any buildings or works or for the continuance of any use of the land or building to which the notice relates.

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16. No doubt, the respondents 3 and 4 filed their application on 19.07.2006 before the first respondent in time under Section 49 of the Act. Section 49 of the Act says that any person not being any State Government or the Central Government or any local authority intending to carryout any development on any land or building shall make an application in writing to the appropriate planning authority for permission in such form and containing such particulars and accompanied by such documents as may be prescribed and the planning authority shall, in deciding whether to grant or refuse such permission.

17. Section 56 (4) (b) clause II of the Act says that if permission is granted under Section 49 of the Act, notice shall not take effect otherwise have full effect or if such permission granted for retention only of some building or works, or continuance of use of only a part of the land or building, notice shall not take effect to that extent. Sub-sections (a) and (b) of sub-section 5 of Section 56 says consequential action to be followed by authority pursuant to the notice for the purpose it was issued. Though sub-sections 3, 4 and 5 of Section 56 of the Act provide certain relief for unauthorised construction, such relief be granted to the extent indicated in Section 49 of the Act.

18. It is evident from the demolition notice dated 28.06.2006 that the respondents 3 and 4 have constructed unauthorised building in block No.13 belonged to the petitioner and constructed 2nd and 3rd floors in contravention of planning permission granted by the second respondent in the year 2004 in block No.15 hence the statute directs to remove both the unauthorised constructions and to restore the land to its condition before the said development took place.

19. Section 49 of the Act is crystal clear that the permission can be granted by the appropriate planning authority to a person intending to carryout any future development not to the person already made unauthorised construction. The learned Additional Advocate General also conceded the legal position.

20. Now, we look into Section 234, 235 and 256 of the Chennai City Municipal Corporation Act, which runs as follows:-

> 234. Application to construct or re-construct building:- (1) If any person intends to construct or re-construct a building, he shall send to the commissioner-
>
> (a) an application in writing for approval of the site together with a site plan of the land, and
>
> (b) an application in writing for permission to execute the work together with a ground-plan, elevations and sections of the building and a specification of the work.
>
> (2) Every document furnished under sub-section (1) shall contain such particulars and be prepared in such manner as may be required under rules or by-laws.

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235. Necessity for prior approval of the site.- The commissioner shall not grant permission to construct or re-construct a building unless and until he has approved of the site on an application made under Section 234.

236. Prohibition against commencement of work without permission - (1)The construction or re-construction of a building shall not be begun unless and until the commencement has granted permission for the execution of the work.

(2) While granting permission under sub-section (1), the commissiner may specify in writing, the precautions to be observed with reference to the construction or re-construction by the person making the application under sub-section (1) of section 234 and such person shall be responsible for the due observance of the precautions.

21. It is evident from the above said sections of Chennai City Municipal Corporation Act that any person intending to construct or re-construct shall send to the second respondent an application in writing for approval of the site together with site plan and the land, an application in writing for permission to execute the work together with a ground-plan, elevation and sections of the building and a specification of the work and every document furnished under sub-section (1) shall contain such particulars and be prepared in such manner as may be required under rules or by-laws, but the second respondent shall not grant permission to construct or re-construct building unless and until he has approved the site and plan on an application made under Section 234. Further, construction or re-construction of a building shall not be begun unless and until the second respondent has granted permission for the execution of the work.

22. Under Section 47 of the Act, no person other than the State Government or the Central Government, or any local authority shall use or cause to be used, any land or carry out any development in that area otherwise than in conformity with such development plan. Section 48 says that no person other than the State Government or Central Government or local authority shall erect any building or make or extend any excavation or carry out any mining or other operation, in, on, over or under any land or make any material change in the use of land or construct, form or layout any work except with the written permission from the appropriate planning authority and in accordance with the conditions, if any, specified therein. Section 85 of the Act confers power to appropriate planning authority that use and development of any land not in confirmity with development plan, order it to restore to original position or itself can restore it.

23. The policy of both the Acts and the scheme provided under sections 234, 235 and 236 of Chennai City Municipal Corporation Act as well as Sections 47, 48, 49 and 85 of the Act express in unequivocal terms that no construction be commenced by a person other

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than the State Government or Central Government or local authority without permission either from the first respondent or second respondent. The respondents 1 and 2 are creatures of statute are bound to carry out its functions within the four corners thereof. Being a statutory authority, they were required to follow the rules scrupulously and their powers are confined to compounding the offences in certain cases only not in cases of blatant violation. Followed Mahendra Baburao Mahadik and others vs. Subhash Krishna Kanitkar and others) (2005) 4 SCC 99, cited supra, hence, the argument of the learned senior counsel for the respondents 3 and 4 that even the persons who constructed unauthorised superstructure also entitled to seek permission under Section 49 of the Act is rejected. The first respondent's power is confined to compounding the offences in certain cases where if any minor violations, not affecting public rights leading to public inconveniences. Any compounding recoil on the public, exemption is to be refused. The person proceeds with unauthorised constructions in total violation of Rules does it with open eyes, aware of the consequences, such persons cannot invoke exemptions which could be granted in slight deviations. Statute shall not encourage illegality or perpetrates an illegality. If the construction is illegal, it has to be demolished. The respondents 3 and 4, admittedly constructed the building in total violation of Regulations. The application filed by the respondents 3 and 4 under Section 49 of the Act seeking to regularise those illegal structures, if it is entertained, would amount to extending the benefits on the person violated the regulations, moreover, it is not permissible under Section 49 of the Act or other provisions of the Act as well as Chennai City Municipal Corporation Act. Certainly, unauthorised constructions invades into the public right and safety. Inadequate personnel, staff in the respondents 1 and 2 department resulted in not taking prompt action. When the said violations affecting public right and safety and failure on the part of the authorities to discharge their statutory objections brought to the notice of this Court, this Court to compel the performance of public duties prescribed by the Statute issue Mandamus.

24. An argument was advanced by the learned Senior counsel for the respondents 3 and 4 that the petitioners suppressing the pendency of the suit before the civil court has filed the writ petition. Of course, the said suppression by the petitioner cannot be entertained, but the fact remains that the suit is one for recovery of possession and consequential reliefs of injunction and mandatory injunction for removal of unauthorised construction in block NO.13. This writ petition is filed seeking Mandamus to demolish and remove unauthorised construction. The petitioner also filed a memo dated 21.07.2006 before this Court, undertakes to file necessary application before the civil court to give up the relief of demolition of the superstructure and this Court accepts the said memo. This order no way fetter the hands of the Court below while deciding the suit in O.S. No. 353 of 2006 relating to ownership or entitlement of the parties on merits.

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25. Though the prayer in the writ petition is to demolish the unauthorised construction in block No.13 belonged to the petitioner,

the respondents 2 and 3 have put up unauthorised construction in block No.15 in total violation of the plan approved by the second respondent and a common notice is issued by the respondents 1 and 2 to demolish both the construction, this Court find no reason to confine such demolition only in respect of the lands of the petitioner in block No.13 alone.

26. For the reasons mentioned above, the respondents 1 and 2 are directed to demolish the unauthorised construction made by the respondents 3 and 4 in T.S. No.1, Block No.13 and also in T.S. No.1, Block No.15 of Velacherry Village within four weeks from the date of receipt of this Order. The writ petition stands disposed of in the above terms. No costs.

rsh

Sd/-
Assistant Registrar

/true copy/

Sub Assistant Registrar

To

1. The Member Secretary
   The Chennai Metropolitan
   Development Authority
   No.8, Gandhi Irwin Road
   Egmore, Chennai - 600 008

2. The Commissioner
   Corporation of Chennai
   Ripon Building
   Park Town
   Chennai - 600 003

ONE CC TO MR.J. RAVINDRAN, ADVOCATE SR NO 32713

ONE CC TO MR. AR. KARUNAKARAN, ADVOCATE SR NO 32514

ONE CC TO MR.L.DAMODARAN, ADVOCATE SR NO 32525

ONE CC TO MR.R. KANNAN, ADVOCATE SR NO 32676

Pre-delivery Order in
WP No. 7200 of 2006

25-07-2006

MAB(CO)

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